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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 475

GEORGE JONES, JR., **Petitioner,**

v.

JESSE VICTOR HOPPER, President of Southern Colorado State College, and C. GALE SELLENS, WILLIAM H. SOUTHARD, ROBERT W. BARTLEY, L. RICHARD BRATTON, PHILLIP M. LORTON, STUART M. McLAUGHLIN, and MRS. WILLIAM B. NAUGLE, Members of the Board of Trustees of Southern Colorado State College, **Respondents.**

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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COUNTER STATEMENT OF CASE

The facts of this case are the allegations which are contained in petitioner's voluminous Complaint and exhibits attached to the Complaint and incorporated therein by reference. It is observed that petitioner has not provided the Court a full record of all the matter contained in petitioner's Complaint and exhibits.

Petitioner's Complaint and the exhibits incorporated therein by reference, in essence, set forth the following fact situation. Petitioner was hired by Southern Colorado State College, on a probationary basis, as a professor of

philosophy on March 26, 1964. His employment contract was to last for one academic year. His employment contract was thereafter renewed in the spring of 1965 for another academic year which would end in May of 1966.

In February of 1966, the College, through its president and board of trustees, elected not to renew petitioner's employment contract for the next succeeding academic year to begin in September of 1966 and so notified petitioner by letter.

Petitioner filed this lawsuit for $300,000 in money damages against the president and members of the board of trustees of Southern Colorado State College for their decision not to renew petitioner's employment contract with the College.

Petitioner's Complaint alleged the powers of the board of trustees as the following:

> "The Board of Trustees is vested by [§§ 124-17-1 and 124-5-1 Colo. Rev. Stats. (1963)] with the entire control and management of the affairs of the College, has general supervision of said college and the control and direction of the funds and appropriations made thereto, with power to appoint and remove all subordinate officers, professors, associate professors, teachers, assistants, employees or agents, in, about, or concerning said College, to appoint or employ, discharge and suspend, contract and fail to renew contracts of employees and other subordinates, and to fix the salaries of each and prescribe their several duties. They further have the power and authority to prescribe the various books and texts to be used in the College, the courses of study and instruction and to

make all needful rules, regulations and By Laws for the good government and management of the same. The actions of President Hopper, hereinafter described, were approved, authorized and ratified by said Board of Trustees, and each of them."

It was further alleged in the Complaint that the acts complained of by petitioner were exercised under color of the statutes, regulations, customs and usages vesting the power referred to.

The Complaint and its attached exhibits then continued with a rather detailed description of some of the petitioner's activities during his probationary association with Southern Colorado State College. He describes at least six different multiple faceted incidents in which he was involved such as:

(1) Petitioner's quite vocal objection to the hiring of another associate professor and resultant non-hiring of petitioner's choice for the position.

(2) Petitioner's multiple publications in the city newspaper of his criticism and ridicule of the College's "General Semantics" course.

(3) Petitioner's published ridicule of Dr. H. I. Hayakawa and his textbook used in the "General Semantics" course and petitioner's part in the controversy which ultimately brought about cancellation of a scheduled personal appearance by Dr. Hayakawa at the College.

(4) Petitioner's founding of an "unofficial," "independent" publication with petitioner establishing himself as "faculty editor" to publish articles criticizing the College, the Vietnam war, labor problems at the local steel

factory and an article by petitioner accusing the College administration of "bugging classrooms" at the College.

(5) Petitioner's advocating pacifism and draft avoidance.

(6) Petitioner's active and physical resistance against execution by sheriff's officers of court ordered hospitalization of a student.

Petitioner concluded that because of his conduct and activities detailed in his Complaint, "[Respondents] terminated his contract as associate professor at said College, thereby carrying out repraisal against plaintiff for the exercise of his Constitutional privileges and violating his right to due process of law, freedom of speech and belief and privileges and immunities of United States citizenship."

Petitioner affirmatively alleged in his Complaint that Respondents' election not to renew petitioner's employment contract was not a breach of contract, but a termination of an expectancy of continued employment which petitioner claims was protected from invasion by the Federal Civil Rights Act.

The case was dismissed with prejudice by the United States District Court for the District of Colorado. Disposition by the District Court was affirmed by the United States Court of Appeals for the Tenth Circuit. The petitioner has now petitioned this Court for certiorari.

ARGUMENT

The judgment of the United States Court of Appeals for the Tenth Circuit is manifestly correct; it does not

depart from the accepted and usual course of procedure and does not warrant the exercise of this Court's power of supervision. There is insufficient basis to warrant a further review by this Court in this case.

I. *PETITIONER, AS A PROBATIONARY EMPLOYEE, HAD NO CONSTITUTIONAL RIGHT TO RENEWAL OF AN EXPIRED EMPLOYMENT CONTRACT.*

Petitioner's Complaint in essence charges that Respondents, individually and acting in conspiracy, refused to renew Petitioner's contract to teach at the college for the next succeeding school year.

While probably not of significant materiality, Petitioner referred to such non-renewal as "termination" of Petitioner's employment, which term is not an entirely accurate usage in this context. "Termination" connotes active as distinguished from passive conduct. In this case, from Petitioner's Complaint together with its incorporated exhibits, it is clear that Respondents' complained of conduct was simply permitting the existing employment contract with the College to lapse or end by its own terms. The fact that a courtesy notice issued to petitioner before the end of the contract period did not create an active termination of Petitioner's employment.

From the Federal Civil Rights Statute*, it is obvious that in order to maintain an action, the party making the claim must allege facts showing that the parties claimed against deprived him of rights, privileges and immunities secured by the Constitution and laws of the United States. *Flemming v. Adams*, 377 F.2d 975 (10th. Cir.), *cert. den.*, 389 U.S. 898 (1967).

* 42 U.S.C. § 1983.

At issue here is whether an employers' election not to renew an employment contract at the end of its term for the alleged reason that the employee, under such contractual arrangement, engaged in certain activities which enjoy full or limited protection under the Constitution, imposes the liability for money damages under the Federal Civil Rights Act. Stated conversely, do the Constitutional rights of free speech, assembly, religion, equal protection and due process carry with them the right to renewed contracts of employment, rendering an employee's job immune without further regard to either conduct of the employee or the terms of the employment contract?

The opinion of the Court of Appeals appropriately surveys the law and establishes the manner of approach in a case such as this. The Constitution and laws of the United States do not generally create any right to continued employment. Petitioner's claimed interest must find its source in his expired appointment. Since his probationary employment arrangement was self-terminating, Petitioner had no expectancy beyond the agreed term. Petitioner was therefore deprived of nothing, regardless of the reasons motivating Respondents to let the contract expire.

It will be noted from the Complaint and Petitioner's arguments herein, that Petitioner was never prevented from exercising his Constitutional rights. Prior restraint is not alleged nor here involved. This case concerns only the allegation that Respondents in some way carried out a repraisal against Petitioner by their exercising discretion and passively permitting the employment contract to expire by its own terms.

Even assuming, as we must, for the purpose of con-

sidering Petitioner's Complaint, that Respondents did decide to let Petitioner's employment contract expire because of Petitioner's frequent insubordination, public ridicule and other less than professional conduct, if Respondents determined that Petitioner, as a probationary employee, was thus undesirable for continued employment, they had a discretionary right and indeed a duty not to renew the employment relationship. See in this regard, *Adler v. Board of Education*, 342 U.S. 485 (1952). If the law were otherwise, there would be no freedom of contract and public employees could practice the rankest form of insubordination, then safely hide behind the right of free speech and be guaranteed absolute and permanent tenure.

We cannot agree with petitioner and those sharing the same interest that dictum of *Bowmar v. Keyes*, 162 F.2d 136 (2d Cir. 1947), establishes the proposition that the courts will protect an expectancy of renewed employment, for the "expectancy" of *Bowmar* in that case was to continue to be employed during the term of the contract which was terminated mid-term and not be offered another contract for a subsequent term. In the *Bowmar* case, a probationary teacher without tenure was *dismissed* during the term of her contract because she was absent from her position while serving on a federal jury. The school board had denied her any right to so serve. Judge Hand held that a teacher under such circumstances has a right to serve on a federal jury and cannot be discharged for doing so, although he conceded that there were limits to the right and that a teacher could be discharged for exceeding those limits.

The case of *Jensen v. Olson*, 353 F.2d 825 (8th Cir. 1965) at 829, distinguishes *Bowmar* in a case such as this:

> The Bowmar case is clearly distinguishable from this case. At issue in Bowmar was the denial of an absolute right to serve on a federal jury. The exercise of this right would not normally disrupt agency functions or destroy the necessary chain of command between a supervisor and employees under his supervision. Here plaintiff asserts a right to make any criticism or advance any charges he deems warranted and remain absolutely secure in his position. He wants the Constitution to serve as a personal protection in this dispute between himself and his superiors. It was not intended to, nor does it serve that function."

The case of *Hopkins v. Wasson*, 227 F. Supp. 278 (E.D. Tenn, 1962) aff'd. 329 F.2d 67 (6th Cir. 1962) cert. den. 379 U.S. 854 (1965) is helpful. In that case a school teacher claimed that the school board had refused to rehire her following the end of the term of her teaching contract because of "slanderous reasons which they uttered against her." The Court noted that she was not on tenure, held that she did not have a right to have her contract renewed and refused to inquire into the reasons for her discharge, regarding the matter as one of contractual rather than constitutional rights.

In *Henry v. Coahoma County Board of Education*, 246 F. Supp. 517 (N.D. Miss. 1963) *aff'd.*, 353 F.2d 648 (5th Cir. 1965) *cert. den.* 384 U.S. 962 (1966) a Negro school teacher brought an action under the Civil Rights Act seeking to be re-employed by the school board claiming that she had not had her contract renewed because she was a Negro. Holding that the real issue was one of contractual rights rather than constitutional protections, the Court stated, (246 F. Supp. at 521):

> "It must be borne in mind that plaintiff had a one year contract for the school year 1961-1962, that this contract was fully performed by the parties thereto, that it ran its course and expired. That contract is not and could not be in this case. By its terms and under the statutes no rights survived its expiration to any of the contracting parties. Defendants could not have required plaintiff to accept another contract, nor can plaintiff now require that she be given a new contract. The fact that she had been employed as a teacher for one year (or for more than one year) gave her no rights to re-employment for the school year 1962-1963, or for any other year."

The Court in *Parker v. Board of Education, Prince George's County, Maryland*, 237 F. Supp. 222, *aff'd.* 348 F.2d 464, *cert. den.* 382 U.S. 1030, *rehearing den.*, 383 U.S. 939 (1966), also looked to and gave effect to contract rights in ordering dismissal of a civil rights case where it was alleged that a probationary teacher was dismissed because of his right of free speech in use of a particular book in class.

The "expectancy" urged by Petitioner as a so-called Constitutional right was self-terminating. No one can have any sort of legally recognized continued contractual expectancy beyond the terms of the agreement which he has voluntarily entered and which itself governs the scope of the rights and obligations between the parties.

Another consideration inheres in the opinion. Petitioner and those sharing his interest refer to speech as an absolute. It is well recognized that not all speech is protected or worthy of protection. A person can be punished for his libels and slanders. A person can be held account-

able for his misrepresentations. One must bear the consequences if he actively incites a riot. The federal government through the Hatch Act may properly bar its employees from certain types of political activity. No person carries with him into the United States Congress, any state legislature, into the Supreme Court, or any other court, a complete Constitutional right to go into those places contrary to their rules and speak his mind on anything he pleases. Rights of free speech and assembly do not mean that everyone with opinions or beliefs to express may address a group at any public place, at any time and in any manner. See in this regard *Adderly v. Florida*, 385 U.S. 39 (1964); *Kovacs v. Cooper*, 336 U.S. 77 (1949); *United Public Workers v. Mitchell*, 330 U.S. 75 (1947); *Waugh v. Mississippi University*, 237 U.S. 589 (1915).

It has always been recognized that insubordination to one's superiors has been a recognized ground for dismissal. The case of *Jensen v. Olson*, 353 F.2d 825 (8th Cir. 1965), is closely parallel on its facts. In that case, a civil service employee of the city was fired. He brought action in the federal court under the Civil Rights statute alleging his employment was wrongfully terminated because of his exercise of his right of free speech and that the defendant city officials and Civil Service Commission had conspired to deprive the plaintiff of his right of free speech, due process and had thus imperiled the city's contractual obligation to plaintiff. The court dismissed the action on defendant's motion and the Court of Appeals affirmed the dismissal. The Court of Appeals observed that plaintiff had no constitutionally protected right to continued public employment and held that plaintiff did not state a claim under the statute. The Court stated at page 828:

"Here plaintiff asserts a right to make any criticism

> or charges he deems warranted under the protection of the First and Fourteenth Amendments. Within the bounds imposed by the laws of libel and slander no one would deny that plaintiff has this right. Plaintiff, however, has no right to public employment. He may speak as he pleases and level charges at all suspects. But if the exercise of this privilege disrupts his own work and reduces the efficiency of the department he is subject to discharge for cause. The plaintiff has an absolute obligation to satisfactorily perform the duties and work inherent in his position. One of these duties is to conform to departmental regulations in making his investigations and reports. He may speak as he wishes but also must be responsible for his statements. When his speech is disruptive of the proper functioning of the public's business the privilege of governmental employment may be withdrawn without it being said that he was denied his freedom of speech. To hold otherwise would enable governmental employees to practice the rankest form of insubordination and safely hide behind the right of free speech. Baily v. Richardson, supra, 182 F2d at pages 59-60 held that 'The first Amendment guarantees free speech and assembly, but it does not guarantee Government employ. * * * [T]here is no basic right to Government employ, any more than there is to employment by any other particular employer'."

In this context it is generally recognized that while speech usually may not be restrained, persons making utterances are responsible for what they say. The nature and character of the utterances are therefore of significance.

In viewing Petitioner's voluminous Complaint and its incorporated exhibits it becomes apparent that there were

a number of different types of utterances and activity involved. There was conduct as well as words. A goodly portion of Petitioner's published ridicule was directed at his employers out of prescribed channels of communication. There was obvious violation of school policy. There was obvious insubordination. Petitioner and those espousing the same interest appear to have been very careful in their effort to divert attention away from the nature and character of Petitioner's utterances and conduct.

The case of *Pickering v. Board of Education*, 391 U.S. 563 (1968), concerned a teacher on tenure, who was dismissed midterm because of his single utterance, as a private citizen, on a matter of "public concern" to wit, a community bond issue election. The Court considered the nature and quality of his speech, finding that it was made away from school as a private citizen and taxpayer concerning a public issue in which he was concerned as any other member of the community. This case is cited by Petitioner as authority for his position in the case, but it will be observed that the facts of that case are quite different from the instant case.

Petitioner suggests that dismissal of his case was perhaps premature. To the contrary; where one by voluminous and detailed pleadings sets forth facts which provide a complete defense, no further factual hearing is necessary. 41 Am. Jur. Pleading §88, p. 353. Indeed, the courts below found there was sufficient basis for dismissal with prejudice.

Petitioner has described his conduct in some detail and his judicial admissions reveal the nature and quality of his activities. Where a probationary instructor was concerned, any one violation of school policy or any one act

of insubordination would be sufficient justification for a desire by an employer not to continue what was obviously becoming an improvident and worsening employment relationship.

Petitioner speaks of "discrimination" and suggests that in this context it makes no difference if a person is being hired for the first time or rehired. Certainly, if a person seeking a probationary teaching job tells his prospective employers on his job application and during his placement interviews that he fully intends not to adhere to school policy; intends to shun usual channels of communication; intends to found an "unofficial" newspaper to enable him to ridicule the school and its administration; intends to publicly spread accusations that the classrooms at the school are "bugged"; intends to embarrass the school administration by creating enough strife and feeling that a nationally recognized educator will cancel his scheduled appearance and avoid school; certainly if a job applicant so notifies his prospective employers of such plans, they would be justified in looking elsewhere to fill the position. Here the quoted language from *Jensen v. Olson, supra,* is clearly applicable.

As was stated in the opinion by the United States Court of Appeals below, *Jones v. Hopper, et al,* 410 F.2d 1323 (10th Cir., 1969), at page 1329:

> "We believe the appellees herein were exercising a discretion given them by power vested under the Colorado statutes set forth in the Complaint. The exercise of this discretion cannot, under the facts alleged in the Complaint, become unlawful conduct which would justify its falling within the ambit of the Civil Rights Act.

" 'Because of the special needs of the university, both public and private, great discretion must be given to it and decisions about renewal of contracts during the probationary period. In deciding whether to rehire or grant tenure, the considerations involved go well beyond a judgment about general teaching competence. " 'Will the interest of an institution of learning be promoted by dispensing with the services of a particular professor? And yet if we assume that the statute of the state is of any virtue, it is just such a question that the plaintiff in error sought to have determined in the Circuit Court. It is a question which, in our opinion, the Legislature intended to commit to the sound judgment of the regents who are selected because of an especial fitness for the performance of such duties, and who, by their experience and their intimate familiarity with the institution, are qualified to exercise that discretion in a far sounder manner than any court or jury could be qualified by evidence adduced through witnesses. It is elementary that no cause of action can arise from the lawful exercise of a statutory power in the absence of an express provision conferring it. It is also a principle of law as securely founded that an exercise of a power by an administrative board or officer to whose judgment and discretion it is committed is not a proper subject of review by the courts when fraud or conditions equivalent thereto do not exist. [Citation.]

" 'It would be intolerable for the courts to interject themselves and to require an educational institution to hire or to maintain on its staff a professor or instructor whom it deemed undesirable and did not wish to employ. For the courts to impose such a requirement would be an interference with the operation of

institutions of higher learning contrary to established principles of law and to the best traditions of education'." [Citation.]

II. *THERE WAS NO CONSPIRACY.*

The second claim in Petitioner's Complaint which alleges conspiracy falls with the first. Respondents were authorized by statutes to exercise their discretion in selecting and maintaining its staff. One cannot be held liable for merely doing in a proper manner that which he has a lawful right to do. *Contract Maintenance Co. v. Local No. 105*, 160 Colo. 90, 415 P.2d 855 (1966). The same principle should apply to a situation as here where the conduct is passive.

Since the only conclusion can be that under Colorado statutes, the exercise of discretion by Respondents was authorized and justified, there is nothing further to consider.

CONCLUSION

For the foregoing reasons, the Petition For Writ of Certiorari should be denied.

Respectfully submitted,

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